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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN ARECHIGA,

Defendant and Appellant.

D073199

(Super. Ct. No. SCD270029)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill and Frederick Maguire, Judges. Affirmed.

Pauline E. Villanueva, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Meredith White and Mary Katherine Strickland, Deputy Attorneys General, for Plaintiff and Respondent.

Detectives found about 10 pounds of methamphetamine in defendant Ruben Arechiga's car after they obtained a search warrant during a traffic stop. Arechiga moved

to suppress the evidence, arguing the detectives made their observations only after they had unlawfully prolonged the traffic stop to allow for a "canine sniff" of the vehicle and to conduct field sobriety tests, neither of which were supported by reasonable suspicion. After the court denied this motion (and a later motion to quash, unseal, and traverse the search warrant), Arechiga pleaded no contest to transportation of a controlled substance for sale and possession of a controlled substance for sale, and admitted certain enhancement allegations. (Health & Saf. Code,<sup>1</sup> §§ 11379, subd. (a), 11378, 11370.4, subds. (a)(1)-(2), 11370.2, subd. (a).) The trial court sentenced him to a six-year split sentence, with half to be served in custody and half to be served on mandatory supervision.

On appeal, Arechiga contends the trial court erred by denying his suppression motion. We disagree. Arechiga does not challenge the validity of the initial traffic stop, and we conclude the detectives had reasonable suspicion to prolong the detention for further investigative activities. Arechiga also challenges—for the first time—two conditions of his mandatory supervision: that he must report law enforcement contacts to his probation officer, and submit his electronic devices to search. We conclude Arechiga's purely facial challenge to the law enforcement contact reporting condition is without merit. We also conclude he forfeited his challenge to the electronics-search

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<sup>1</sup> Further statutory references are to the Health and Safety Code unless otherwise indicated.

condition by failing to object below, which he has not shown constituted ineffective assistance of counsel.

Accordingly, we affirm.

### FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2016, Arechiga was charged with transporting a controlled substance for sale (§ 11379, subd. (a)) and possessing a controlled substance for sale (§ 11378), with one- and four-kilogram quantity-based enhancement allegations (§ 11370.4, subds. (a)(1)-(2)). The operative amended information includes an additional enhancement allegation arising from a 1999 federal conviction for importing methamphetamine (§ 11370.2, former subd. (a); 21 U.S.C. §§ 952, 960).

#### *Motion to Suppress*

Ten days after he was charged, Arechiga moved under Penal Code section 1538.5 to suppress (among other things) "[a]ny items that were seized from [his] vehicle after [he] was illegally stopped, detained, and searched on December 15, 2016." The prosecution opposed the motion. The court heard the motion concurrently with the preliminary hearing, which formed the evidentiary basis for the motion.

#### *Prosecution Evidence*

Detectives Christopher Manookian and Robert Forbes testified for the prosecution. They had each been with the San Diego County Sheriff's Department for at least 20 years, were currently assigned to the department's "border crime suppression team," had extensive training regarding controlled substances, and had each made several hundred drug-related arrests.

On the morning of December 15, 2016, the detectives were working patrol together in a marked patrol car. In the 6700 block of Friars Road, near a busy mall, the detectives observed a white Ford Explorer make an unsafe lane change while traveling at 50 miles per hour in a 45 mile-per-hour zone. The detectives initiated a traffic stop, and the Explorer pulled to the side of the road. Dispatch records indicate the traffic stop began at 10:00 a.m.

As soon as Detective Manookian exited the patrol vehicle to approach the Explorer, he "noticed immediately" that the driver, later identified as Arechiga, was repeatedly yelling out the window, " 'What seems to be the problem?' " Manookian found this "unusual" because, in the "couple thousand traffic stops" he has conducted, "people are not already asking [him] what the problem is before [he] even get[s] there." Arechiga "seemed real agitated," so Manookian told him to " 'calm down.' "

Detective Manookian asked Arechiga if the Explorer was his, and Arechiga responded that it was. Manookian then asked Arechiga for his driver's license, registration, and proof of insurance. Arechiga handed his license to Manookian, then just stared at him in an "odd" manner. Manookian observed that Arechiga's hand "was shaking uncontrollably" as he handed over the license. Manookian had to remind Arechiga to also provide his registration and proof of insurance. Arechiga appeared "very agitated and very nervous" as he looked for the documents in the glove box. From the passenger side, Detective Forbes saw Arechiga "rooting items out of [the glove box] and even thr[owing] a couple . . . around the interior of the car," before reporting he could not locate the requested documents. Both detectives testified Arechiga's conduct thus far,

which included "[r]apid speech" and "fidgeting with his hands," was consistent with someone under the influence of a controlled substance. Manookian also said, "It was just something I normally don't see on traffic stops, if at all."

Detective Manookian walked back to the patrol car to begin a records check, which he does "all the time" so he will "know who is in the car" and whether he or she has a criminal history, warrants, or is "on some sort of probation." Detective Forbes told Manookian at the patrol car that Arechiga "was acting nervous and whatnot." Manookian re-approached Arechiga and asked if he had anything illegal in his vehicle and if he would consent to a search of it. Arechiga responded "no" to both questions. At this point, according to Manookian, "at most" two minutes had elapsed from the beginning of the traffic stop.

Arechiga then asked why he had been pulled over. When Detective Manookian explained it was for speeding and making an unsafe lane change, Arechiga repeatedly called Manookian "a liar." Arechiga added he was "[p]robably going *slower*" than the posted speed limit, not faster. (Italics added.) Manookian testified he had "really never had anyone sit there and call [him] a liar over a traffic stop. [He] just found that odd."

Detective Manookian returned to the patrol car and told Detective Forbes that Arechiga appeared nervous and would not consent to a search. Manookian was "waiting for a records check still," and "started filling out a citation." Forbes continued talking to Arechiga, then returned to inform Manookian that Arechiga had just disclosed he had a prior conviction for transporting methamphetamine and had done "a fair amount of time."

Manookian suggested they summon a narcotics canine. This occurred "just over five" minutes into the traffic stop.

Both detectives testified they believe Forbes then called a Border Patrol canine agent via cell phone.<sup>2</sup> Neither dispatch records, the detectives' reports, nor the call log on Forbes's cell phone, which he searched while on the witness stand, indicate the time Forbes placed this call. Both detectives testified the canine unit arrived "pretty quick[ly]," and Manookian estimated it was about five minutes into the traffic stop. During this time, Manookian was still waiting for the records check results and filling out a citation.

Border Patrol Agent Ramon Garcia arrived and asked Arechiga if he would consent to a "canine sniff" of his vehicle. Arechiga consented to an exterior sniff, but not an interior sniff. Garcia then conducted an exterior sniff with his canine, which came back negative. During the sniff, Arechiga remained in his vehicle and appeared to be video-recording the incident with his phone. Detective Manookian testified he "found [it] kind of odd" that Arechiga remained in his vehicle because Manookian has "been around many narcotics sniffs . . . and usually the person steps out of the car." The sniff lasted about two minutes (according to Garcia and Manookian, though Manookian also testified

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<sup>2</sup> Detective Forbes testified he has "worked with sheriff's canines, Border Patrol canines, [and] Harbor Police canines," and that whom he calls first "just depends [on] who is available." When asked if he had any information indicating the Border Patrol canine agent "was nearby," Forbes claimed privilege, which the trial court construed as pertaining to either official information (Evid. Code, § 1040) or informant identity (Evid. Code, § 1041). The privilege issue was resolved by defense counsel rephrasing his question.

it may have lasted five minutes). Manookian estimated a total of about five to seven minutes had elapsed from the beginning of the traffic stop to the end of the canine sniff, during which he continued to await the results of the records check and filled out the traffic citation.<sup>3</sup>

After the sniff, and while Detective Manookian was in the patrol car still awaiting the results of the records check and writing a citation, Detective Forbes asked Arechiga to exit his vehicle to undergo field sobriety tests (FSTs). This occurred about 10 minutes into the traffic stop. Arechiga rolled his windows up, exited his vehicle, threw his keys inside, and locked them in the vehicle. Forbes considered this behavior "unusual."

Forbes then conducted the FSTs, which indicated Arechiga had an elevated pulse of 130 beats per minute, "a white pasty coating" on his tongue, and an "extended" result of 45 seconds on the 30-second "Romberg test,"<sup>4</sup> without eyelid tremors. Based on these results, as well as Arechiga's conduct during the traffic stop, the detectives believed he may have been under the influence of a controlled substance. Forbes placed Arechiga, without handcuffs, in the back of the patrol car. Manookian estimated the FSTs lasted two or three minutes and were completed about 13 minutes into the traffic stop. He estimated about 15 minutes had elapsed from the beginning of the traffic stop until

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<sup>3</sup> Detective Manookian acknowledged on cross-examination that he did not need the results of a records check or canine sniff to complete the citation.

<sup>4</sup> Forbes explained that during the Romberg test, "you essentially put your heels and toes together, tilt your head back, close your eyes and estimate 30 seconds."

Arechiga was placed in the patrol car. During this time, Manookian was still awaiting the results of the records check.

A minute or two after detaining Arechiga, Detective Manookian walked back to Arechiga's car. Through the darkly tinted windows, which were rolled down about two inches, Manookian "could smell a definite chemical" that he had "smell[ed] before being around large amounts of methamphetamine." He shared this observation with Forbes, then looked inside through the small window opening. Manookian saw that the center console "appeared to be a little bit . . . in pieces." In the back seat, he saw some "white objects" in a backpack, and a Tupperware container with a lid, which was wrapped in cellophane. Based on his training and experience, Manookian recognized the wrapped Tupperware as the type of packaging used to transport "larger amounts of narcotics . . . to thwart detection." Manookian estimated he made these observations about 17 to 20 minutes into the traffic stop.

Detectives Manookian and Forbes called another detective (Detective Heredia) to discuss how to proceed. Heredia indicated he would speak with a deputy district attorney, then get back to Manookian and Forbes. Heredia "soon called . . . back and said, 'Hold the scene. I'm getting a search warrant.' "

About three hours later, a search warrant was obtained. The detectives informed Arechiga of this, then searched his vehicle. Inside the backpack, the detectives



discovered 10 packages of methamphetamine, weighing a total of about 10 pounds.

Manookian opined the methamphetamine was possessed for sale.<sup>5</sup>

The detectives arrested Arechiga and transported him to jail. At the jail, they did not draw his blood or book him for driving under the influence.

### *Defense Evidence*

Arechiga called Agent Garcia as a defense witness to impeach the prosecution timeline by establishing the detectives had called Garcia *before* they had even begun the traffic stop. Garcia testified he received a call on his personal cell phone from one of the detectives "around 9:30 or so," or "maybe . . . around 9:45," while he was in San Ysidro.<sup>6</sup> He then drove to the scene of the traffic stop, which took about 15 or 20 minutes. He estimated he arrived "probably soon after" the traffic stop had begun because "one of [the detectives] was speaking with the defendant and [the other] looked like he was doing a records check in the vehicle." After the negative canine sniff, Garcia remained at the scene for 10 or 15 minutes as the detectives "conduct[ed] some type of tests on" Arechiga. At the advice of his counsel, Garcia did not prepare a report of the incident.

### *Trial Court's Ruling*

After hearing argument from counsel, the trial court (Judge O'Neill) denied Arechiga's suppression motion. The court "accept[ed] . . . the testimony of the . . .

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<sup>5</sup> The detectives also found a notepad containing several names and phone numbers with dollar amounts; and various panels inside the car were not secured, which the detectives concluded was consistent with vehicles used to transport narcotics.

<sup>6</sup> Agent Garcia also testified he was not entirely sure of the timeline.

detectives" that they had valid reasons for the traffic stop, which entitled them to temporarily detain Arechiga to investigate the traffic offenses and run a records check. Although the lack of a clear timeline was "of some interest" to the court, the court nonetheless found the duration of the detention was not excessive.

The court also found "[t]here is no evidence the canine sniff unduly prolonged the detention . . . because, in fact, the other detective [Manookian] had not even completed the traffic citation or the records check yet."

As to the FSTs, the court found Detective Forbes had a sufficient basis to investigate based on Arechiga's prior drug conviction, "unusual behavior when he purposely lock[ed] his keys in the car" and "his overall behavior, et cetera."

Regarding the approximately three-hour delay in obtaining a search warrant, the court took judicial notice that its telephonic warrant line was not available at the time of the traffic stop; thus, the delay was "not unreasonable under the circumstances" involved in obtaining a warrant in-person at the courthouse.

Apart from the warrant, the trial court found the evidence admissible under the plain view doctrine because the detectives observed contraband in the back of Arechiga's vehicle when "they ha[d] a lawful right to be where they [we]re, according to their testimony."

Finally, the court noted the lack of evidence supporting Arechiga's theory that the traffic stop was pretextual: "I am limited to the evidence. I am not allowed to speculate as to what I think occurred. *I don't see any evidence at this time for a pretext stop.* I am limited to what I heard in the courtroom, however." (Italics added.)

As to the preliminary hearing, the court held Arechiga to answer on all charges.

*Motions to Dismiss and to Unseal, Quash, and Traverse the Search Warrant*

A few days after the prosecution filed the operative amended pleading, Arechiga filed a motion to dismiss based largely on the same arguments raised in his initial suppression motion. A few weeks later, he filed a motion to unseal, quash, and traverse the search warrant. He argued there was "a reasonable probability" the warrant was based on "a false or misleading statement," and that "oddities" occurred during the traffic stop.

The prosecution opposed both motions.

The trial court (Judge Steven Stone) denied Arechiga's motion to dismiss. A few weeks later, the court (Judge Daniel Lamborn) partially granted the motion to unseal, unsealing all but one part of the search warrant. However, none of the unsealed materials are in the record on appeal.

Arechiga does not challenge these rulings in this appeal.

*No-contest Plea*

On October 3, 2017, Arechiga changed his plea from "not guilty" to "no contest." The only inducements identified on the change-of-plea form state: "sheet plea; court indicates 5-7 years with a split." Arechiga did not waive any appellate rights as part of his plea.

*Sentencing*

Before sentencing, the probation department prepared a report detailing Arechiga's criminal history and risk factors for reoffending. In July 1999, Arechiga was arrested

while attempting to drive a car containing 60 pounds of marijuana into the United States from Mexico. No charges were filed. The following month, Arechiga was convicted of importing 3.3 pounds of methamphetamine into the United States from Mexico. He served 30 months in federal prison and four years on supervised release. On the current convictions, the probation department recommended Arechiga receive an 11-year split sentence, with five years to be served in custody and the balance on mandatory supervision.

At the sentencing hearing, Arechiga's counsel acknowledged the court had indicated a sentencing range of five to seven years, and asked the court "to go downward with a five-year term, and . . . to split it with three years in and two years out." The prosecutor argued the court should "impose the upper lid of the range of seven years," with "no split."

The trial court (Judge Maguire) imposed a six-year split sentence to be served three years in local custody, and three years on mandatory supervision. The court imposed certain conditions of mandatory supervision, including that Arechiga report contacts with law enforcement to his probation officer, and subject his electronic devices to search.

## DISCUSSION

### *I. Motion to Suppress*

Arechiga contends the trial court erred by denying his motion to suppress because the challenged evidence was discovered under a search warrant he contends was improperly obtained based on observations the detectives made after they unlawfully

prolonged what had begun as an admittedly lawful traffic stop. The trial court properly denied Arechiga's suppression motion.

### A. *Relevant Legal Principles*

#### 1. *Search and Seizure Principles*

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." (U.S. Const., 4th Amend.; see Cal. Const., art I, § 13.) Although a traffic stop "constitutes a 'seizure' of 'persons' within the meaning of" the Fourth Amendment, such a seizure is constitutionally "reasonable where the police have probable cause to believe that a traffic violation has occurred." (*Whren v. United States* (1996) 517 U.S. 806, 809-810 (*Whren*).) But "a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." (*Illinois v. Caballes* (2005) 543 U.S. 405, 407 (*Caballes*).) Thus, "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." (*Ibid.*)

In *Rodriguez v. United States* (2015) 135 S.Ct. 1609 (*Rodriguez*), the United States Supreme Court considered these principles in the context of a canine sniff conducted in connection with a traffic stop. The officer in *Rodriguez* initiated a traffic stop after the defendant drove on the freeway shoulder. (*Id.* at p. 1612.) After the officer completed a records check on the driver and passenger, issued a written warning, explained the warning to the driver, and returned the driver's and passenger's

documentation, the officer then prolonged the stop by an additional seven or eight minutes while he summoned a canine unit that conducted a sniff that "revealed a large bag of methamphetamine." (*Id.* at p. 1613.) The district court concluded that although the canine sniff was not supported by reasonable suspicion, the additional delay was a constitutionally permissible de minimis intrusion on the defendant's constitutional rights. (*Id.* at pp. 1613-1614.) The Eighth Circuit affirmed. (*Id.* at p. 1614.)

The United States Supreme Court reversed, holding "that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a ticket for the violation." (*Rodriguez, supra*, 135 S.Ct. at p. 1612.) "Authority for the seizure thus ends when [the] tasks tied to the traffic infraction are—or reasonably should have been—completed" (*id.* at p. 1614), *unless* "reasonable suspicion of criminal activity justified detaining [the defendant] beyond completion of the traffic infraction investigation" (*id.* at pp. 1616–1617).

The *Rodriguez* court elaborated on the scope of the traffic-stop mission: "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop,' " such as "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. [Citations.] These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are

operated safely and responsibly." (*Rodriguez, supra*, 135 S.Ct. at p. 1615.) A canine sniff, however, "is not fairly characterized as part of the officer's traffic mission." (*Ibid.*) Thus, police may prolong a traffic stop to conduct a canine sniff only if the need for the sniff is independently supported by reasonable suspicion. (*Ibid.*; cf. *Caballes, supra*, 543 U.S. at pp. 408-409 [police may conduct a canine sniff without reasonable suspicion if doing so does not prolong the traffic stop].)

Reasonable suspicion requires "the detaining officer [to] point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.) The reasonable suspicion standard "is not a particularly demanding one, but is, instead, 'considerably less than proof of wrongdoing by a preponderance of the evidence.' " (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 146 (*Letner*).)

The *Rodriguez* court remanded for a factual determination of whether reasonable suspicion justified detaining the defendant longer than was necessary to complete the traffic-stop mission. (*Rodriguez, supra*, 135 S.Ct. at pp. 1616-1617.)

## 2. *Standard of Review*

"Where, as here, a motion to suppress is submitted to the superior court on the preliminary hearing transcript, 'the appellate court disregards the findings of the superior court and reviews the determination of the magistrate who ruled on the motion to suppress, drawing all presumptions in favor of the factual determinations of the magistrate, upholding the magistrate's express or implied findings if they are supported

by substantial evidence, and measuring the facts as found by the trier against the constitutional standard of reasonableness.' [Citation.] 'We exercise our independent judgment in determining whether, on the facts presented, the search or seizure was reasonable under the Fourth Amendment.' " (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1033; see *People v. Camacho* (2000) 23 Cal.4th 824, 830.)

### B. *Analysis*

Arechiga does not challenge the validity of the initial traffic stop.<sup>7</sup> Thus, under *Rodriguez*, the detectives were entitled to detain Arechiga for as long as it took (or reasonably should have taken) to complete the traffic-stop mission. (*Rodriguez, supra*, 135 S.Ct. at pp. 1612, 1614-1615.) This mission included "determining whether to issue a traffic ticket," "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." (*Id.* at p. 1615.)

#### 1. *Canine Sniff*

The magistrate who ruled on the suppression motion (Judge O'Neill) expressly found "[t]here is *no evidence* the canine sniff unduly prolonged the detention . . . because . . . [Detective Manookian] *had not even completed the traffic citation* or the records check yet." (Italics added.) Substantial evidence supports this factual finding.

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<sup>7</sup> Although he does not challenge the validity of the initial traffic stop, Arechiga at times suggests it was pretextual. Whether the stop was pretextual has no bearing on the objective analysis of whether it was supported by probable cause. (See *Whren, supra*, 517 U.S. at p. 811; *People v. Gomez* (2004) 117 Cal.App.4th 531, 537.)



Manookian testified the canine unit arrived within a few minutes of the commencement of the traffic stop; the sniff lasted about two minutes (as Agent Garcia also testified) and was completed within seven to ten minutes of the commencement of the traffic stop; and he was still writing the traffic citation—a core function of the traffic-stop mission—when the sniff was completed. The record thus supports the finding that the canine sniff was completed before the traffic-stop mission was complete and, therefore, did not unlawfully prolong the stop.

Arechiga vigorously attacks the detectives' credibility regarding the timeline of the traffic stop in light of Agent Garcia's potentially conflicting testimony.<sup>8</sup> However, "[w]e do not reweigh evidence or reevaluate a witness's credibility" on appeal. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215 (*Houston*).)

Arechiga next argues that even if the traffic stop had not, in fact, been completed by the time of the canine sniff, the detention was nonetheless unlawfully prolonged because it "*should have reasonably* been completed by the time the canine sniff was conducted." (Italics added.) (See *Rodriguez, supra*, 135 S.Ct. at p. 1614 ["Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed."].) However, Arechiga cites no evidence showing how long it should have taken Detective Manookian to issue the traffic citation, or that the canine sniff could not have been completed within that timeframe. (See *People v. Vera* (2018)

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<sup>8</sup> Agent Garcia's testimony was only *potentially* conflicting because he acknowledged he "ha[d] no idea" regarding the actual timeline of events.

28 Cal.App.5th 1081, 1089 ["[the defendant] also did not establish how long it takes [one officer] (or [another officer]) to write a citation. [The defendant] did not establish that [the second officer] took more time than usual to write it. On this record, we cannot conclude that the dog alert occurred after the citation reasonably should have been issued."].)

## 2. *FSTs*

We also conclude from the totality of the circumstances that the detectives had reasonable suspicion to further prolong Arechiga's detention to evaluate him for driving under the influence of a controlled substance. Both detectives testified Arechiga exhibited signs of being under the influence from the outset of the traffic stop. Detective Manookian, who had conducted a "couple thousand traffic stops," testified about several behaviors Arechiga exhibited that were "unusual," "odd," or Manookian had "never" seen before. As soon as Manookian got out of the patrol car, Arechiga engaged in the "unusual" behavior of yelling out to the detective. Arechiga seemed very agitated, spoke rapidly, and fidgeted with his hands to a degree Manookian "normally [does not] see on traffic stops, if at all." After Manookian asked for Arechiga's license, registration, and insurance, Arechiga handed him only the license, then stared in an "odd" manner and had to be reminded about the other documentation. Arechiga's hand "was shaking uncontrollably" when he handed over his license. When Manookian explained the reason for the traffic stop, Arechiga became argumentative and repeatedly called him "a liar," which Manookian "just found . . . odd" because it had "really never" happened to him before. Manookian also "found [it] kind of odd" that Arechiga remained in his vehicle

during the canine sniff because people "usually" get out. In addition to these observations, the detectives learned during the traffic stop that Arechiga had a prior conviction for transporting a controlled substance. Considering the totality of these circumstances, as we must, we conclude the detectives had reasonable suspicion sufficient to prolong the detention to conduct FSTs. (See *United States v. Arvizu* (2002) 534 U.S. 266, 274 [courts may not engage in a "divide-and-conquer analysis" of evaluating and rejecting individual factors in isolation]; *United States v. Sokolow* (1989) 490 U.S. 1, 9 ["Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."]; *Letner, supra*, 50 Cal.4th at p. 146 ["the possibility of innocent explanations for the factors relied upon by a police officer does not necessarily preclude the possibility of a reasonable suspicion of criminal activity"].)

These observations, coupled with Arechiga's performance on the FSTs, provided the detectives with probable cause to place Arechiga under "constructive arrest" (in the magistrate's words) for driving under the influence. " ' "To be 'under the influence' within the meaning of the Vehicle Code, the liquor or liquor and drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties." ' " (*Espinoza v. Shiimoto* (2017) 10 Cal.App.5th 85, 101-102 (*Espinoza*), quoting *People v. McNeal* (2009) 46 Cal.4th 1183, 1192-1193.) " '[E]vidence of actual impairment may include the driver's appearance, an odor of alcohol, slurred speech, impaired motor skills, slowed or erratic mental

processing, and impaired memory or judgment. Conversely, absence of these manifestations may indicate that the driver was not impaired.' " (*Espinoza*, at p. 102, quoting *McNeal*, at p. 1198.)

The task in determining the existence of probable cause "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238.) "The showing required in order to establish probable cause is less than a preponderance of the evidence or even a prima facie case." (*People v. Carrington* (2009) 47 Cal.4th 145, 163 (*Carrington*); see *Gates*, at pp. 243-244, fn. 13 ["probable cause requires only a substantial chance."].)

The detectives' observations regarding Arechiga before the FSTs contribute to a finding of probable cause that Arechiga was driving under the influence of a controlled substance. As noted, Arechiga spoke rapidly, fidgeted excessively, and appeared very agitated. (*Espinoza, supra*, 10 Cal.App.5th at p. 102 [" 'the driver's appearance' " is a relevant factor].) Detective Manookian, who had conducted thousands of traffic stops, opined Arechiga exhibited unusual behavior (e.g., yelling as Manookian first approached, staring oddly, calling Manookian a liar, and remaining in the vehicle during the canine sniff), which may constitute " 'slowed or erratic mental processing' " or " 'impaired . . . judgment.' " (*Ibid.*)

Arechiga's unusual behavior continued when he exited his vehicle to perform the FSTs—he rolled up his windows and deliberately locked his keys inside.

During the FSTs, Detective Forbes observed Arechiga had an elevated pulse and a pasty white coating on his tongue, both of which indicated to Forbes that Arechiga was under the influence. Arechiga's performance on the Romberg test indicated delayed mental processing, which is indicative of impairment. (*Espinoza, supra*, 10 Cal.App.5th at p. 102.)

Considering the totality of these circumstances in light of the showing required to establish probable cause—"less than a preponderance of the evidence or even a prima facie case" (*Carrington, supra*, 47 Cal.4th at p. 163)—probable cause supported Arechiga's de facto arrest for driving under the influence of a controlled substance.

Arechiga challenges the detectives' credibility regarding their belief he was driving under the influence. For example, he asserts "the first time" they expressed concern about driving under the influence was after the negative canine sniff. He also notes his blood was never drawn and he was never charged with driving under the influence. Again, however, " '[w]e do not reweigh evidence or reevaluate a witness's credibility' " on appeal. (*Houston, supra*, 54 Cal.4th at p. 1215.) Moreover, the examples Arechiga cites are not persuasive. First, the detectives testified they observed behaviors early in the traffic stop consistent with Arechiga being under the influence. Second, it is reasonable that the detectives would change the focus of their investigation from driving under the influence to transportation of large amounts of illicit drugs after they discovered 10 pounds of methamphetamine in Arechiga's vehicle.

Arechiga also advances a new factual argument on appeal: that the "three-hour delay between the initial detention and the issuance of a search warrant was unjustified and unlawful." (Bolding omitted.) Assuming this issue is not forfeited by virtue of Arechiga's failure to raise it in the trial court, the appellate record contradicts the claim. The magistrate on his own motion took judicial notice of the fact the court's telephonic warrant line was unavailable during the traffic stop and, thus, three hours to obtain a warrant in-person was reasonable under the circumstances. We defer to the magistrate's factual finding regarding his court's warrant procedures.

Because we conclude the detectives did not unlawfully prolong Arechiga's detention, their observations from the beginning of the traffic stop until the time they secured the scene could properly be included in a probable cause affidavit for a search warrant of his vehicle. Most notably, this includes the chemical smell and suspiciously wrapped Tupperware that were in the detectives' plain smell and view. Accordingly, the trial court properly denied Arechiga's motion to suppress the evidence discovered as a result of the warrant.<sup>9</sup>

## II. *Conditions of Supervision*

Arechiga challenges two conditions of his mandatory supervision: that he must report law enforcement contacts to his probation officer, and submit his electronic devices to search. He did not object to these conditions at sentencing. We conclude

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<sup>9</sup> We therefore need not address whether any of the exceptions to the warrant requirement apply.

Arechiga's purely facial challenge to the law enforcement contact reporting condition has not been forfeited, but is without merit. We further conclude he forfeited his challenge to the electronics-search condition by failing to object below, and has not shown the failure to object constituted ineffective assistance of counsel.

#### A. *Relevant Legal Principles*

Under the Criminal Justice Realignment Act of 2011, "qualified persons convicted of nonserious and nonviolent felonies are sentenced to county jail instead of state prison. [Citation.] Trial courts have discretion to commit the defendant to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision." (*People v. Catalan* (2014) 228 Cal.App.4th 173, 178; see Pen. Code, § 1170, subd. (h)(5)(B).) When a court places a defendant on mandatory supervision as part of a split sentence, the court may impose conditions "to be monitored by county probation officers 'in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation.' " (*People v. Martinez* (2014) 226 Cal.App.4th 759, 762-763 (*Martinez*); see Pen. Code, § 1170, subd. (h)(5)(B).) The Legislature has determined "mandatory supervision is more similar to parole than probation." (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1423.) Nevertheless, "[t]he validity and reasonableness of parole conditions [are] analyzed under the same standard as that developed for probation conditions." (*Martinez*, at p. 764).

Under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), " '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3)

requires or forbids conduct which is not reasonably related to future criminality . . . ."

[Citation.]" ( *People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *Lent*, at p. 486.)

"This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." ( *Olguin*, at p. 379.)

In addition to withstanding a reasonableness analysis under *Lent*, probation conditions must also withstand constitutional analysis. ( *In re Sheena K.* (2007) 40 Cal.4th 875, 890 ( *Sheena K.*); see *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.) " 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " ( *Pirali*, at p. 1346.)

Similarly, "[a] probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness." ( *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) "A probation condition is not impermissibly vague ' ' 'simply because there may be difficulty in determining whether some marginal or hypothetical act is covered by its language.' " " " ( *In re I.V.* (2017) 11 Cal.App.5th 249, 261.) We give the condition " 'the meaning that would appear to a reasonable, objective reader.' " ( *Olguin*, *supra*, 45 Cal.4th at p. 382.)



"As a general rule, failure to challenge a probation condition on constitutional or *Lent* grounds in the trial court waives the claim on appeal." (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033; see *People v. Welch* (1993) 5 Cal.4th 228, 237; *Sheena K.*, *supra*, 40 Cal.4th at p. 889.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]" (*Sheena K.*, at p. 881.) We may nevertheless consider a facial challenge first raised on appeal when it presents a pure question of law capable of resolution " 'without reference to the particular sentencing record developed in the trial court.' " (*Id.* at pp. 884, 886, 887-889.)

#### B. *Reporting of Contacts With Law Enforcement*

Condition 1.j requires Arechiga to: "Provide true name, address, and date of birth if contacted by law enforcement. Report contact or arrest in writing to the P.O. within 7 days. Include the date of contact/arrest, charges, if any, and the name of the law enforcement agency." Arechiga "does not challenge the portion of the condition requiring him to report any *arrests* to probation," but he does contend "the portion regarding '*contact*' is unconstitutionally vague because it does not clearly delineate what type of contact would necessitate reporting." (Italics added.) He also argues "the condition is overbroad because it encompasses a wide range of activity that would otherwise not require reporting to a probation officer." Although he did not object on these grounds below, we will consider them because they present pure questions of law.

Arechiga bases his constitutional challenges on *People v. Relkin* (2016) 6 Cal.App.5th 1188 (*Relkin*), in which the court considered a probation condition that

required the defendant "to 'report to the probation officer, no later than the next working day, any arrests or any contacts with or incidents involving any peace officer.' " (*Id.* at p. 1196.) The defendant argued that the phrases " 'contacts with' and 'incidents involving' peace officers are uncertain because one cannot determine whether those terms include occasional conversation with a police officer who lives down the street, answering an officer's questions as a witness to a crime, or participation in a demonstration where officers are present." (*Id.* at pp. 1196-1197.) The defendant further contended the condition was vague "because it is subject to the ' "whim of any police or probation officer," ' and unconstitutionally infringes on [the defendant's] rights under the First Amendment of the United States Constitution." (*Id.* at p. 1197.)

The *Relkin* court determined the condition was vague, in part. Specifically, the court found that "the portion of the condition requiring that defendant report 'any contacts with . . . any peace officer' " was vague because it "does indeed leave one to guess what sorts of events and interactions qualify as reportable." (*Relkin, supra*, 6 Cal.App.5th at p. 1197.) The court reasoned it was not certain the condition would not be triggered "when [the] defendant says 'hello' to a police officer or attends an event at which police officers are present, but would be triggered if [the] defendant were interviewed as a witness to a crime or if his 'lifestyle were such that he is present when criminal activity occurs,' " as the People had argued on appeal. (*Ibid.*) "The language does not delineate between such occurrences and thus casts an excessively broad net over what would otherwise be activity not worthy of reporting." (*Ibid.*)

In contrast to the condition at issue in *Relkin*, condition 1.j's requirement that Arechiga "[p]rovide true name, address, and date of birth if contacted by law enforcement" would appear to a reasonable, objective reader to refer to contacts initiated by a law enforcement officer in which the officer requests that information from Arechiga. This would not include mere greetings by law enforcement officers or conversations with officers at events attended by Arechiga. Further, the requirement that Arechiga report the "contact or arrest" and include the "name of the law enforcement agency" indicates that the interaction must be of the type and nature that either the law enforcement officer supplied that information to Arechiga, or that Arechiga was made aware of this information because the nature of the "contact" was sufficiently meaningful. This, too, indicates that a reasonable reading of the condition sufficiently delineates between casual, random interactions between Arechiga and a law enforcement officer, including the exchanging of pleasantries, and situations in which Arechiga is a witness to a crime or is specifically stopped and questioned by a law enforcement officer. The mere fact that there " ' ' ' may be difficulty in determining whether some marginal or hypothetical act is covered by [a condition's] language' " ' " does not render the condition "impermissibly vague." (*In re I.V.*, *supra*, 11 Cal.App.5th at p. 261.) We therefore reject Arechiga's vagueness and overbreadth challenges to condition 1.j.

### C. Condition Allowing Searches of Electronic Devices

Condition 1.m of Arechiga's mandatory supervision requires him to "[s]ubmit person, vehicle, residence, property, personal effects, computers, and recordable media . . . to search at any time with or without a warrant, and with or without reasonable cause,

when required by P.O. or law enforcement officer." Arechiga contends this condition is unreasonable under *Lent* and constitutionally overbroad.<sup>10</sup> He did not object on either of these grounds at sentencing. Consequently, he forfeited his *Lent* challenge and his as-applied overbreadth challenge.

Arechiga purports to also assert a purely facial overbreadth challenge. To support this claim, he cursorily cites *People v. Appleton* (2016) 245 Cal.App.4th 717, 725, in which the court observed that because "the scope of a digital search is extremely wide . . . a search of [a defendant's electronic storage devices] could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity." Our court has previously distinguished *Appleton* in the probation context because *Appleton*'s rationale was based largely on the United States Supreme Court's decision in *Riley v. California* (2014) 573 U.S. 373, which involved privacy concerns in the materially distinguishable context of a search incident to arrest. (See, e.g., *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1129 ["As a defendant who has pleaded guilty to a felony and accepted probation in lieu of additional punishment, defendant has a diminished expectation of privacy as compared to law-abiding citizens or those subject to searches incident to arrest."], rev. granted Dec. 14, 2016, S238210.) Accordingly, to the extent Arechiga asserts a facial overbreadth challenge, we find it unavailing.

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<sup>10</sup> Challenges to similar conditions are pending before the California Supreme Court. (See, e.g., *In re Ricardo P.* (2015) 241 Cal.App.4th 676, rev. granted February 17, 2016, S230923; *People v. Trujillo* (2017) 15 Cal.App.5th 574, rev. granted Nov. 29, 2017, S244650.)

Likely anticipating we would find a forfeiture, Arechiga contends his trial counsel performed ineffectively by failing to assert *Lent* and overbreadth objections at sentencing. We disagree.

"To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " (*People v. Kipp* (1998) 18 Cal.4th 349, 366; see *Strickland v. Washington* (1984) 466 U.S. 668, 687.)

"If . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate court must reject the claim of ineffective assistance unless there can be no satisfactory explanation for counsel's conduct." (*People v. Kendrick* (2014) 226 Cal.App.4th 769, 778, fn. omitted.) In *Kendrick*, the appellate court rejected the defendant's claim that his trial counsel had performed ineffectively by failing to object to a probation condition that required probation approval before using the Internet. (*Id.* at p. 779.) The court reasoned that because "trial counsel had already negotiated an extremely favorable disposition for" the defendant, "trial counsel could have reasonably concluded that the trial court would not have entertained an objection to the probation condition. This is especially true since by that time case law had upheld Internet access conditioned on a probation officer's approval." (*Ibid.*)

Here, too, Arechiga's trial counsel could reasonably have concluded the trial court would not have entertained an objection in light of the favorable five- to seven-year indicated sentence. The prosecutor sought the upper end of this range with no split sentence, and the probation officer recommended an 11-year split sentence with five years in custody. Defense counsel asked the court "to go downward with a five-year term, and . . . to split it with three years in and two years out." Defense counsel could reasonably have concluded it would be more advantageous to spend his time arguing for a shorter sentence than to object to a standard probation condition similar to those upheld by several panels of this court.

#### DISPOSITION

Affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.